Supreme Court, U.S.
FILED
AUG 8 1996
CLERK

(2)

No. 95-2043

In the Supreme Court of the United States

OCTOBER TERM, 1995

WESTERN RADIO SERVICES COMPANY, INC., PETITIONER

v.

DAN GLICKMAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether electromagnetic interference with radio transmissions constitutes "environmental" harm within the meaning of the National Environmental Policy Act of 1969 (NEPA).

2. Whether petitioner, a radio communications company that allegedly suffered economic injury as a result of potential electromagnetic interference caused by a competing facility authorized to operate on federal land, has standing to sue under NEPA.

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The opinion of the court of appeals (Pet. App. 1-16) is reported at 79 F.3d 896. The opinion of the district court (Pet. App. 17-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1996. The petition for a writ of certiorari was filed on June 17, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of Agriculture (Secretary) manages national grasslands as components of the national forest system. See 16 U.S.C. 1609(a); 7 U.S.C. 1010 *et seq.*; 16 U.S.C. 497, 551. The Secretary is authorized by statute to permit the private use of

lands within national forests "for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety," 16 U.S.C. 497(a), or "for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests," 16 U.S.C. 497(c). In 1980, the Forest Service of the Department of Agriculture adopted regulations setting forth standards governing the issuance of special use permits. 36 C.F.R. 251.50-251.65. Section 251.54(i) identifies various factors that the Service may consider when determining whether a permit should be issued. In particular, Section 251.54(i)(1) provides that the Service may deny issuance of a special use permit if the proposed use "would be inconsistent or incompatible" with other existing forest uses. Section 251.52 states that "[s]pecial use authorizations * * * shall be in such form and contain such terms, stipulations, conditions, and agreements as may be required by the regulations of the Secretary and the instructions of the Chief [of the Forest Service]."

Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C), requires that a federal agency must prepare a detailed statement on the environmental impact of any proposed "major Federal action[] significantly affecting the quality of the human environment." That statement is known as an Environmental Impact Statement (EIS). The regulations implementing NEPA provide that an agency may prepare an Environmental Assessment (EA) to determine whether an EIS is required. 40 C.F.R. 1501.4, 1508.9(a). If, on the basis

of an EA, the agency determines that the proposed project will have no significant impact on the environment, then the agency makes a "finding of no significant impact," 40 C.F.R. 1501.4(e), and need not prepare an EIS.

2. Gray Butte is located on the Crooked River National Grassland in the Ochoco National Forest in eastern Oregon. See Pet. App. 5. Gray Butte presently contains five buildings that house 17 radio transmitters. S.E.R. 266.[1]

On February 3, 1976, the Forest Service issued a special use permit to respondent Slater Communications and Electronics, Inc. (Slater) to operate a radio facility at Gray Butte. S.E.R. 240-243. On January 20, 1978, the Service issued a special use permit to petitioner Western Radio Services Co., Inc., to operate a radio facility at Gray Butte. E.R. 29-32. Both permits, like all other special use permits for Gray Butte, are contingent upon authorization from the Federal Communications Commission (FCC), and require the permittee to operate all equipment in strict compliance with FCC requirements. S.E.R. 243, E.R. 32.

In 1980, the Forest Service decided to update the existing site plan for the Gray Butte Electronic Site. The Service prepared an EA that was "tiered" to (*i.e.*, based upon) the existing EIS for the Crooked River National Grassland Land Management Plan. S.E.R. 264-299. The new site plan was published in 1981.

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[1] S.E.R. refers to the Supplemental Excerpts of Record filed by respondent Slater Communications and Electronics, Inc., in the court of appeals in this case. A.R. refers to the Administrative Record compiled by the Forest Service. E.R. refers to the Excerpts of Record filed in the court of appeals by petitioner in this case.

S.E.R. 305-319. No one appealed or challenged the EA or the 1981 site plan.

The EA for the 1981 site plan for Gray Butte proposed to eliminate some of the existing buildings and construct several small structures to be blended into the site. A.R. 49. It provided that the five existing buildings would remain at their present locations for the duration of their respective permits. Upon the expiration of each permit, the building and its current use would be reassessed under the new site plan objectives to determine if the permit should be renewed. S.E.R. 310.

The site plan also called for the construction of four new buildings and towers on the site. S.E.R. 310. The new buildings and towers would be constructed one at a time, from east to west. Each of the new buildings and towers would have to be filled to 80% of capacity before the next one could be built. S.E.R. 311. The site plan noted that due to the small area available at the site, "the possibility of horizontal separation for reducing radio interference from multiple users is very limited." S.E.R. 309. Therefore, the 1981 site plan allowed tower/antenna heights of up to 60 feet, to allow for vertical separation. *Ibid.*

3. On June 12, 1985, the Forest Service (Service) determined that it would renew Slater's special use permit for its existing facility. E.R. 43. However, the Forest Service also informed Slater that it had decided to offer for competitive bidding the opportunity to construct a new facility, as outlined in the site plan. The Forest Service stated that Slater would have the opportunity to compete for the chance to construct and own the new building, but that if Slater won the bid, then "[a]t the time that the new building

is completed," Slater would be expected to move into the new facility and take down its old one. *Ibid.*

The opportunity to construct the new facility was initially awarded to another company. E.R. 52. When that company declined the offer, however, Slater was chosen to construct the new facility. A.R. 112-113. On December 10, 1986, the Forest Service issued Slater a special use permit to construct, maintain, and rent a new building and tower on Gray Butte. S.E.R. 328; A.R. 202-210. Richard Oberdorfer, petitioner's president, general manager, technician, and sole shareholder, appealed the issuance of the special use permit. Oberdorfer argued that the permit did not conform to the 1981 site plan, and he complained of potential interference with petitioner's facility. S.E.R. 329. Slater was permitted to intervene in Oberdorfer's appeal. A.R. 220, 222. After a hearing, the Forest Supervisor denied the appeal. In his written statement of reasons, the Forest Supervisor specifically rejected Oberdorfer's complaints of interference, noting that they were unsubstantiated. S.E.R. 336. The Forest Supervisor also noted that petitioner might be causing its own interference problems by using substandard transmission line rather than the jacketed heliax type of transmission line required by the site plan. *Ibid.*

Oberdorfer appealed the Forest Supervisor's decision to the Regional Forester. E.R. 98A-99. Slater again intervened. On February 4, 1988, the parties to the administrative appeal agreed to a settlement. S.E.R. 339-342. The Forest Service agreed to clarify the intent of the 1981 site plan, to cancel Slater's 1986 special use permit to construct the new building, and to permit Slater to remain in its existing building until the site plan amendments were completed. The

Forest Service, Slater, and Oberdorfer agreed that Slater would be given the right of first refusal when the next opportunity to construct a new building was offered. *Ibid.*

In 1989, the Forest Service adopted a new site plan, and in 1990 it issued Slater a new building permit. Pet. App. 5. The 1989 site plan permits only "compatible uses of the site" and requires any equipment or tower that causes interference to be adjusted or removed. *Ibid.* Petitioner again complained about potential interference and appealed from the Forest Service's reissuance of a permit to Slater. *Id.* at 6. The Forest Supervisor denied the appeal, and petitioner appealed to the Regional Forester. *Ibid.*

Although the Regional Forester declined to reverse the Forest Supervisor's decision to issue the permit, he directed the Forest Service either to document its efforts to resolve Western's complaints about current or potential interference, or to hold meetings with site users to address potential incompatibility problems. Pet. App. 6. After the Forest Service had conducted several meetings with users, the Regional Forester determined that the agency had complied with the earlier decision. *Ibid.* The Forest Supervisor subsequently issued a Decision Notice and a finding of no significant impact, stating his intention to issue Slater a special use permit authorizing the construction of a building and tower at Gray Butte. *Ibid.* Western again appealed to the Regional Forester, who affirmed the decision to issue a special use permit to Slater. *Ibid.* On May 17, 1993, the Chief of the Forest Service declined discretionary review. *Ibid.*

4. Petitioner then filed suit in federal district court against the Secretary, officials of the Forest

Service, and Slater. Its complaint alleged that the Forest Service's decision to issue Slater a special use permit violated 16 U.S.C. 497, because the agency had allegedly failed to comply with applicable regulations. Pet. App. 6. Petitioner also alleged that the Forest Service had violated NEPA by issuing the permit without adequate consideration of environmental factors. *Id.* at 6, 48. The district court entered summary judgment in favor of the federal defendants and Slater, holding that the Forest Service had not abused its discretion in issuing the special use permit to Slater, see *id.* at 24-28, and that petitioner did not have standing under NEPA to challenge the issuance of the permit, see *id.* at 28-29. The court also stated that, even if petitioner were found to have standing, the court would "agree with defendants that the relocation of Slater's facility is not a 'major' federal action having a 'significant impact' on the environment which would trigger additional NEPA requirements." *Id.* at 29.

The court of appeals affirmed. Pet. App. 1-16. The court held that the Forest Service had adequately considered the compatibility of Slater's proposed facility with existing uses, in compliance with applicable regulations. *Id.* at 8-14. The court also held that the district court had properly dismissed petitioner's NEPA claim for lack of standing. *Id.* at 14-15. The court explained that "NEPA's purpose is 'to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore, a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA.'" *Id.* at 14 (quoting *Nevada Land Action Ass'n* v. *United States Forest*

Serv., 8 F.3d 713, 716 (9th Cir. 1993)) (emphasis omitted).

The court of appeals acknowledged that its prior decision in *Port of Astoria* v. *Hodel*, 595 F.2d 467 (9th Cir. 1979), had suggested that plaintiffs alleging economic injury might have standing under NEPA where the "primary impact" of a proposed action is "environmental," and where the plaintiff's economic injuries are "causally related to an act that lies within NEPA's embrace." Pet. App. 15 (quoting *Port of Astoria*, 595 F.2d at 476). The court held, however, that any such exception to the general rule that economic injuries are insufficient to confer standing under NEPA was inapplicable to the instant case. The court explained that "[n]o one alleges that Slater's new facility will have a primary impact on the natural environment," and it rejected petitioner's "attempt[] to characterize the alleged interference as an 'environmental impact.'" Pet. App. 15 (internal quotation marks omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

Suits alleging violations of NEPA are reviewed under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 375-376 (1989). In addition to constitutional standing requirements, a plaintiff who challenges federal agency action under the APA must demonstrate that the interests he asserts are "arguably within the zone of interests to be protected or regulated by the statute or consti-

tutional guarantee in question." *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 396 (1987) (quoting *Association of Data Processing Serv. Org., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)). See also, *e.g.*, *Air Courier Conference* v. *Postal Workers*, 498 U.S. 517, 523-524 (1991). In the instant case, the court of appeals correctly held that the interests asserted by petitioner are not within the zone of interests protected by NEPA.

1. NEPA requires that federal agencies prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C). Petitioner contends that "this case raises an important issue of law concerning whether pollution of the airwaves by stray electromagnetic emissions constitutes a direct effect on the environment within the meaning of NEPA." Pet. 6. Petitioner cites no authority, however, holding that electromagnetic interference constitutes an "environmental" impact within the meaning of NEPA. In the absence of any conflict in authority, the narrow question presented by this case does not warrant this Court's review.

The court of appeals correctly held (see Pet. App. 15) that the electromagnetic interference allegedly caused by Slater's facility was not an "environmental impact." NEPA requires the preparation of an EIS with respect to any major federal action "significantly affecting the quality of the *human* environment." 42 U.S.C. 4332(2)(C) (emphasis added). See also, *e.g.*, 42 U.S.C. 4331(a) (declaring that "it is the continuing policy of the Federal Government * * * to use all practicable means and measures * * * to create and maintain conditions under which man and nature can exist in productive harmony"); S. Rep. No.

296, 91st Cong., 1st Sess. 16 (1969) ("The expression 'environmental quality' symbolizes the complex and interrelated aspects of man's dependence upon his environment."); *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 327 (1975) (typical "environmental consequences" of agency action include "increased solid waste disposal and accelerated depletion of natural resources"). Petitioner does not contend that the electromagnetic waves emitted by Slater's facility pose a threat to human health or safety. Nor does petitioner contend that the operation of Slater's facility will deplete natural resources or otherwise lead to the long-term degradation of the natural environment. Rather, petitioner's sole complaint is that electromagnetic interference produced by Slater's facility will hinder the operation of petitioner's business.[2] Such an impact, even if it existed, would not constitute a significant effect on "the quality of the human environment" triggering an obligation to prepare an EIS.[3]

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[2] Indeed, Oberdorfer acknowledged in his deposition that there would be no "interference" if only one radio transmitter was located on Gray Butte. S.E.R. 225. Thus, while interference is unquestionably a "physical phenomenon" (Pet. 15), it has no effect on the *human* environment. It affects only the radio waves emitted by other transmitters.

[3] Petitioner contends that the Forest Service's "own handbooks, manuals, and directives acknowledge the existence of the environmental harm in question." Pet. 16. That assertion is incorrect, or at least misleading. Forest Service regulations state that a special use permit may be denied if the proposed use "would be inconsistent or incompatible" with existing forest uses. 36 C.F.R. 251.54(i)(1); see 16 U.S.C. 497(c) (Secretary is authorized "to permit the use and occupancy of suitable areas of land within the national forest * * * whenever such use is related to or consistent with other uses on

2. Petitioner also seeks review of the question "whether NEPA protects the economic as well as the environmental interests of claimants subject to environmental harms." Pet. 5-6; see also Pet. 9-10 ("Does economic harm to a plaintiff resulting from environmental harm bring that plaintiff within the zone of interests protected by the National Environmental Policy Act?"). That question is not presented by this case, and the court of appeals did not purport to decide it. As we explain above, see pages 9-10, *supra*, the alleged electromagnetic interference that forms the basis of petitioner's complaint is not "environmental" harm within the meaning of NEPA.

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the national forests"). The Forest Service's Manual and Handbook state that the potential for electromagnetic interference must be considered in determining whether a proposed communications facility would be "inconsistent or incompatible" with existing forest uses. See Pet. 16-19. The Forest Service's determination that the potential for electromagnetic interference should be considered, however, is not an acknowledgment that such interference constitutes a potential threat to "the quality of the human environment" for which an EIS is required.

In the instant case, both the court of appeals and the district court concluded that the Forest Service had adequately considered the possibility of electromagnetic interference before awarding the special use permit to Slater. See Pet. App. 9-14, 25-27. Indeed, the court of appeals observed that "[t]he permit does not authorize any new uses that could cause interference," because the permit itself expressly provides that authorization for Slater's new facility will terminate if the facility is found to cause interference. *Id.* at 13. The fact that the Service fully considered the possibility of electromagnetic interference before issuing the permit substantially mitigates, if it does not eliminate entirely, any injury that petitioner might be thought to have suffered as a result of the Service's failure to prepare a formal EIS addressing the same subject matter.

Unlike the hypothetical bottler of spring water described in the petition (see Pet. 22), petitioner's economic injury therefore is not derivative of any harm to "the quality of the human environment." 42 U.S.C. 4332(2)(C).[4]

The court of appeals stated that it need not resolve the question whether plaintiffs alleging economic injury would have standing under NEPA where those economic injuries were causally related to environmental harms. See Pet. App. 14-15. Rather, petitioner was found to lack standing because "[n]o one [had] allege[d] that Slater's new facility will have a primary impact on the natural environment." *Id.* at 15 (internal quotation marks omitted). The court rejected petitioner's characterization of the alleged interference as an "environmental impact." *Ibid.* This case therefore does not present the question whether plaintiffs who suffer economic injuries as a result of agency actions having substantial environmental

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[4] We do not disagree with petitioner that a person (like the hypothetical bottler of spring water, see Pet. 22) who suffers economic injury as a direct result of harm to the environment would fall within the zone of interests protected by NEPA and would therefore have standing to challenge a federal agency's failure to prepare an EIS. Nothing in our brief in the court of appeals is to the contrary. Rather, we argued that petitioner lacked standing because "[petitioner's] alleged economic injury is not the direct result of any action that will have an impact on the natural environment." Gov't C.A. Br. 33. See also *id.* at 31 ("[i]nterference is not an environmental effect"), 31-32 ("interference is not an impact on the environment; it is an impact on another operator's radio waves"), 32 ("what [petitioner] is alleging in support of its NEPA standing is an economic injury to itself and no injury at all to the environment"), 33 ("interference is not an environmental harm").

consequences fall within the zone of interests protected by NEPA.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1996

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[5] There is no reason for the Court to hold the petition pending its decision in *Bennett* v. *Spear*, cert. granted, No. 95-813 (Mar. 25, 1996). Cf. Pet. 4-5. The petitioners in *Bennett* argue that no zone of interests test applies to suits brought under the citizen suit provision of the Endangered Species Act of 1973, 16 U.S.C. 1540(g). See 95-813 Pet. 9-16. NEPA, however, contains no citizen suit provision. Rather, suits alleging non-compliance with NEPA are brought under the APA; and it is well established that APA actions are governed by a zone of interests test. See pages 8-9, *supra*.